Supreme Court of New York.

OWEN A. GILL AND OTHERS *v.* EDMUND PAVENSTEDT AND OTHERS.

It is a well-settled rule in the law of sales of personal property that when anything remains to be done as between buyer and seller there is no delivery so as to cut off the right of stoppage *in transitu*, or the right of detention for unpaid purchase-money. It is not necessary that the act remaining to be done should determine the quantity or the quality of the goods sold, but it may be any act whatsoever, within the contemplation of the parties to the contract.

A. purchased goods warehoused in a bonded warehouse from the importer, B., in whose name they were entered. The goods were bought on a credit at a specified price, and the duties were to be paid by A. as a part of the price. He had withdrawn by permission of B., parcels of the goods at different times, paying the duties on such parcels. Before the credit expired B. gave to A. an order on the bonded warehouseman to transfer the residue of the goods to A.'s name, which was done accordingly. As between the parties and the government, the goods still remained in B.'s name. They could only be withdrawn under the regulations of the treasury department, by a "withdrawal entry," signed by B. or by some one authorized by him in writing. While the goods were in this condition the purchaser, A., became insolvent. He demanded that B. should sign the necessary withdrawal entry, which the latter refused to do, except upon full payment of the price.

Held, that an act remained to be done as between buyer and seller of such a nature that there was no delivery either actual or constructive, and that B. had a right of detention of the goods for the unpaid purchase-money.

Held, further, that an action in equity would not lie to compel B. to sign the requisite withdrawal entry, since there was no trust created by the transaction, in the absence of payment or its equivalent.

BEFORE Hons. WILLIAM F. ALLEN, JOSEPH S. BOSWORTH, and THEODORE W. DWIGHT, referees.

Action in equity to compel the defendants to sign a withdrawal entry.

Platt, Gerard & Buckley, for plaintiffs.

Henry Nicoll, for defendants.

BY THE REFEREES.—The facts in this case are briefly these:—

The plaintiffs were, at the time of the transactions hereafter detailed, partners in trade carrying on business as jobbers in teas in the city of New York and the defendants were also partners doing business in the same city as importers of teas.

On the 20th of August 1867 the defendants through the agency of brokers sold to the plaintiffs a quantity of teas amounting to

2388 half chests, imported by them in the bark Japan. Sixty-one of these chests were subsequently rejected by mutual consent, as damaged, leaving the number actually sold 2327. These were warehoused in bond in the defendants' name, with the exception of 26 half chests, which having been retained by the defendants as sample chests, and the duties having been paid by them, were directly transferred to the plaintiffs.

These teas were all marked alike, and were parcel of a larger importation entered by the defendants under one warehouse entry.

The controversy in this case concerns a portion of the 2301 chests. They were warehoused with Snyder & Sons, who kept a private bonded warehouse in the city of New York, duly authorized under the regulations of the United States Treasury Department.

The teas were sold on a credit of sixty days to the plaintiffs at a fixed price per pound. The duties at 25 cents per pound were to be paid by the plaintiffs, and the amount thus paid was to be credited as a cash payment on the teas. The plaintiffs were to have the benefits of the unexpired storage and of the fire insurance running to September 1st. A bill of parcels was furnished to the plaintiffs, specifying the numbers of the chests sold, their net weight, price, and terms of sale.

The United States treasury regulations concerning bonded warehouses are such, that until the duties are paid the goods are in the joint custody of the warehouseman and of an officer of the customs, at the charge and risk of the importer and subject at all times to his order on the payment of the duties.

The defendants, through their attorney in fact, contemporaneously with their entry of the goods gave a bond required by law conditioned for the payment of duties, &c.

By the course of business at the custom-house, whenever it is desired to withdraw the goods in bond or a portion of them from the warehouse, a "withdrawal entry" is made. This must be signed either by the person in whose name the goods are warehoused or by some person duly authorized by that party in writing. Thereupon, on payment of the duties, the goods may be withdrawn, and a "permit" is issued by the collector to the storekeeper of the port directing the goods to be delivered from the warehouse.

Under this practice 500 chests of the tea had been withdrawn

by the defendants on the application of the plaintiffs at three several times: 300 on the 24th of August; 100 on the 3d of September, and 100 on the 7th of September. The gold to pay the duties was supplied by the plaintiffs, but nothing was paid to the defendants on account of the teas.

On the 3d of September the defendants gave the plaintiffs an order on Snyder & Sons, directing them to transfer to the plaintiffs all the sound teas which had been sold to them.

Snyder & Sons contemporaneously gave a receipt to the plaintiffs of the following tenor: "Received from bark Japan, transferred from the account of E. Pavenstedt & Co., on storage in Snyder & Sons' stores, subject to the order of [the plaintiffs] 2179 half chests tea, marked, &c." At the same date the plaintiffs insured for $25,000 gold, the former insurance having expired September 1st.

Such was the effect of these transactions that there were 1801 chests of tea, parcel of the entire purchase, held by Snyder & Sons, and not withdrawn from the bonded warehouse, on the 14th of September 1867. On that day the plaintiffs became insolvent. After that date, and before the commencement of this action, the plaintiffs applied to the defendants either to withdraw the teas themselves, or to permit the plaintiffs to withdraw them. At the same time they offered the gold necessary to pay the duties. The defendants declined this proposition unless they were paid the amount due to them for the tea, on the ground of the insolvency of the plaintiffs, whereupon this action was brought.

The only questions presented on these facts are, whether the title to and possession of the teas have passed so completely to the plaintiffs that the defendants cannot retain them for the unpaid purchase-money, and whether the latter can be compelled in equity to sign a withdrawal entry so that a permit may be issued from the custom-house to allow the plaintiffs to take the teas into their actual possession.

It is urged on the part of the plaintiffs that the ownership of the teas had passed to them, and that in point of law *delivery* had taken place so as to defeat any lien for unpaid purchase-money or to prevent any stoppage *in transitu*. They urge that nothing remained to be done between the parties to the contract, and that the indorsement of the warehouse entry was simply a matter between the defendants and a third party, viz., the government.

They claim that the defendants became bailees or trustees of the warehouse documents, holding them subject to the plaintiffs' control. They say that the question of delivery is one of intention, to be inferred from all the facts in the case, and that the facts that the goods were sold on credit; that the duties were payable by the purchasers; that the benefit of the unexpired storage and fire insurance was made over to them, and the withdrawal of the 500 chests at the plaintiffs' request, all unequivocally show that there was a complete intention to deliver the teas. The effect of these acts, they insist, cannot be overcome by the non-performance of a ministerial formal act like counting or weighing goods or indorsing a warehouse entry.

The defendants say on their part that the lien of the vendor for unpaid purchase-money or the extension of it known as stoppage *in transitu*, is to be treated with favor and should receive a liberal construction—that there is a marked distinction between the passing of the title or right of property upon a contract of sale and the vesting the purchaser with the possession of the thing sold. They admit that the title to the tea vested in the plaintiffs, but say that the possession had never been actually or constructively transferred to them, and that the plaintiffs could not obtain possession without a further and material act on the part of the defendants. They insist that though the ownership has passed, the contract is still executory as to the possession, and that the acts of Snyder & Sons were inchoate and incomplete and were of no effect until the withdrawal entry was made, and that the true test to determine whether a change of possession has been effected or not is, to ascertain whether anything remains to be done by the vendor.

It should be remarked that this case is disembarrassed of some of the considerations which have affected other cases arising under this branch of the law. In many instances, the rights of second or sub-purchasers have been involved, and the courts have protected them by the doctrine of equitable estoppel, or other rule favorable to them. These plaintiffs, the original purchasers, ask a court of equity to interfere actively so as to deprive the defendants of the control of goods for which the former have not paid, do not offer to pay, cannot pay anything. There are certainly no "persuasive" equities in their favor, and they must rest their claim on a technical rule of law.

We hold that the authorities establish the following propositions:—

1st. On a contract for the sale of goods and chattels, there results to the vendor, out of the contract itself, a right to detain the goods as security for the price of them, on the vendee becoming insolvent while the goods remain in the actual possession of the vendor. In such a case the right exists notwithstanding the contract has been consummated so that the title to the goods has become vested in the vendee, and all risk from their depreciation or destruction, not imputable to the misconduct or neglect of the vendor, has been cast on the vendee.

2d. So, too, though the goods may have passed out of the actual possession of the vendor and be in transit from him to the vendee, yet if, when the insolvency occurs, they have not come to the possession of the vendee, but are in the possession of a carrier or other intermediary, the vendor may stop the goods, resume the possession, and hold them as security for the unpaid purchase-money.

3d. Where the goods, at the time the contract of sale is made, though in the legal custody and control are not in the actual possession of the vendor, but are so situated that the purchaser cannot obtain actual possession until a specific act is done by the vendor, if the vendee becomes insolvent before this act has been done, and the actual possession of the goods has not been changed, the vendor may detain the goods as security for the payment of the contract price, and as a consequence, will not be compelled by a court of equity to perform the act in question. The right of detention in case of the intervening insolvency of the vendee, may be exercised by the vendor so long as the vendee has neither obtained actual possession nor been furnished by the vendor with the exclusive means and power of controlling the possession.

We think that the case before us belongs to the class included within the proposition last stated.

In discussing it, it will not be unprofitable to recall some elementary rules in the law of sales. As far as the passing of the title is concerned, the contract of sale may be executed or executory, and it is now well settled that where, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into the state in which the purchaser is to be bound to receive them, or where anything remains to be done for the pur-

pose of ascertaining the price where the price is to depend on the quantity or quality of the goods, no title passes, and the contract is executory: Blackburn on Sales 152.

The title, however, may pass and the ownership be transferred, and still the sale may be imperfect as to the possession. "The parties may by the terms of their agreement bargain that the right of property shall vest in the purchaser forthwith, but that the right of possession shall remain with the vendor until the fulfilment of any conditions they please:" Id. 198.

Such a condition may not only be express, but may be implied from the circumstances of the case. Thus the parties in an ordinary sale are presumed to make the payment of the price contemporaneous with the delivery of the possession, and the possession cannot be had without the payment, though the ownership is transferred.

The authorities establish that a condition preceding delivery may be implied whenever an act remains to be done by the vendor.

It is not necessary, as urged by the plaintiffs, that this act should be with a view to ascertain quality or quantity. That may be a proper test to determine whether ownership has passed, but it is not a sufficient test to determine whether the right to the possession has passed. In *Owenson* v. *Morse*, 7 Durnford & East 60, the purchaser had bought articles of plate at an ascertained price. He wished to have his arms engraved upon the plate, which the seller agreed to have done at his own expense by an engraver whom he usually employed. The plate, after being engraved, was to be returned to the seller. It was held that the delivery to the engraver was not such a delivery to the purchaser as to cut off the right of detention. It was said by one member of the court that the seller, though he might recover of the purchaser for "goods bargained and sold," could not recover of him for "goods sold and delivered." This case, of course, decides in principle that if the engraving had been done by the seller instead of a third person, he would not have been a mere bailee to do the engraving, and it holds that the act to be done was a condition precedent to delivery. It justifies the remark of Lord BROUGHAM in *Cowasjee* v. *Thompson*, 3 Moore, India App. 422, that "if anything remains to be done between the buyer and seller, the goods may be stopped."

The most favorable rule which can be suggested for the plain-

tiffs is, to hold that the possession has passed if the goods are under the control of the vendee so that he can reduce them into actual possession without any act of the vendor. If they could have got possession simply by paying duties to the United States without any act on the vendor's part, it might be admitted in the absence of special circumstances, that they had the constructive possession, which they might on payment make an actual possession. This, perhaps, may be inferred from *Portalis* v. *Tetley*, 5 Law Rep. Eq. Cases 140 (A. D. 1868). It was there held that a factor who had pledged goods for less than their value had them still in "his possession" and control so that he could pledge them for further advances under the "Factors' Act." Vice-Chancellor WOOD held, in substance, that as the pledge could be redeemed at any time, by payment of the debt, the goods were in the factor's possession and control, subject to the debt being paid off.

What then are the acts in the present case which precede delivery? One is the necessity on the part of the vendor of making a withdrawal entry; the other is a duty on the part of the vendee, imposed upon him by the contract, of paying the duties.

The effect of the first of these acts remaining unperformed is well illustrated in the cases under the English Warehousing Acts. The practice under these acts is so different from our own that the authorities must be applied with the greatest caution.

This practice in the case of imported goods is well detailed in the recent case of *Pearson* v. *Dawson*, 1 Ellis, Blackburn & Ellis R. 447. It is there said, in the statement of facts by the reporter: "It is not the practice for the officers of the customs to notice any change of ownership. They retain their control over the goods until the duty is paid, after which they leave it to the warehousekeeper to deliver the goods to the person entitled to them. Any original purchaser or sub-purchaser who required [a parcel of the goods] to be delivered to him had to obtain an order in writing signed by the defendant addressed to his warehousekeeper to deliver the parcel, and on presenting the order so signed the parcel would be delivered accordingly if the duty had been paid, and without such an order no one could obtain the delivery of a single parcel:" p. 449.

This order on the warehouseman, known as "the delivery order," is the only act necessary to be done by the vendor. The vendee having the order can immediately reduce the goods to his actual

possession by paying duties. This is in marked contrast to our system, where the order by the vendor on the bonded warehouseman of itself accomplishes nothing, but there must be in addition, as a vital prerequisite, a withdrawal entry signed by the vendor. Under the English system, this act is to be done between the vendee and the government.

This course of business, slightly modified in connection with the warehousing of spirits under the Excise Acts, came under discussion in the Irish cases of *Haig* v. *Wallace*, 2 Hudson & Brooke 671 (A. D. 1831); *Orr* v. *Murdock*, 2 Irish Com. Law R. N. S. 9 (A. D. 1851); and *In re Thomas Hughes*, 12 Irish Chan. 450, 463 (A. D. 1861).

In the first and leading case of *Haig* v. *Wallace*, the plaintiffs were the owners of goods in a bonded warehouse which had been deposited by them as distillers. The goods, twenty puncheons of spirits, were sold to one Meade on a credit, who received a "delivery order" upon the warehouseman, who made a transfer in his books to the purchaser. Soon after ten more puncheons were sold with a like delivery order and transfer by the warehouseman. Three of the puncheons, having been sold to a sub-purchaser, were withdrawn from bond. It appeared that though a document called a "request note," which answers to our "withdrawal entry," was necessary on the part of the seller, yet that as soon as the "delivery order" was granted, the purchaser was *authorized* by law or custom to *sign in the seller's name:* pp. 673, 674.

The court held, on this state of facts, that the goods were delivered and that the seller had no right of detention, notwithstanding the insolvency of the purchaser. The distinction which we seek to enforce is expressly taken. Says the court: "If a constructive possession be given to the vendee by the vendor, the right of stoppage *in transitu* is precluded, and in this case the vendor had no possession himself but a constructive one, for the actual possession remained in the officer, and the vendor by the order of delivery gave that which he had, subject to the claims of the crown, to which the vendee became liable instead of him. *If, indeed, an act by the vendor were afterwards necessary towards giving actual possession of any part of the goods to the vendee, and if the request note necessary for that purpose were in fact the act of the vendor, it would be different*, but that is not so: the request note is the act of the vendee using the name of the

vendor, and the officer receives it as such and acts upon it, and delivers the permit upon it, without any interference or further participation in the transaction by the vendor after his giving the first order for delivery:" pp. 684, 685.

So *In re Hughes*, *supra*, it is said that "the delivery orders form a complete title for possession in the person to whom they are given by the vendor, that is, the revenue officer acts upon them, allowing the party named to pay duty and draw the goods *without any further act* being done by the [vendor]:" p. 464. Again: "The goods are in possession of the crown. The distiller has not actual possession of them. That possession so remains until the duty is paid. * * *Every act* of the distiller [vendor] has been *done to complete* the contract:" p. 466.

It may well be doubted whether these cases are not too favorable to the purchaser. The court in *Haig* v. *Wallace* misconceived one material fact. The vendor did not cease to be liable on his bond for the duties, and the right of retention ought to continue in that case until the duties are paid. See remarks of PENNEFATHER, B., in *Orr* v. *Murdock*, *supra*, p. 19. Be this as it may, these decisions show conclusively that the British courts would not hold, under our Warehousing Acts and practice, that a "delivery order" accepted by the bonded warehouseman was equivalent to a delivery, so long as the withdrawal entry had not been signed. These cases fully explain the remark of Lord CAMPBELL, cited by the plaintiffs from *McEwen* v. *Smith*, 2 House of Lords Cases 309, 330, that if the goods had been transferred on the warehouse-keeper's books, there would have been a sufficient delivery to cut off the vendor's lien. It has reference to the effect of a "delivery order" under the practice already detailed. The Scotch courts take the same view of the effect of the delivery order: Remarks of judges *passim* in *McEwan* v. *Smith* in the Scotch courts, 9 Court of Session R. N. S. 434.

The position of an English merchant *before granting* any delivery order is quite analogous to the present case. The sale may be complete, yet if the duties are to be paid as a part of the price and they have not been actually paid, or if the merchant has not signed the delivery order, as between buyer and seller there is no delivery.

In *Winks* v. *Hassall*, 9 Barn. & Cress. 372, A. had two pipes of wine in a bonded warehouse standing in B.'s name in the cus-

tom-house books, who had given a bond for the payment of the duties. A. sold the wine to C. and gave him a delivery order. It was agreed that C. should pay the duties. B. was subsequently called upon to pay the duties on his bond, and removed the goods to his own warehouse. They had not been transferred from his name to that of the purchaser. The court held that the lien continued even though warehouse rent was charged by B. to C., and that it had not been waived by the delivery order, since the goods had never been transferred from B.'s name. No point was made as to the bonded warehouseman, but the whole case turned upon the position that the goods were still entered in B.'s name. PARKE, J., said that "by the contract the bankrupt was to pay a certain price for the wine and the duty also. The duty was, in substance, an additional part of the price to be paid before the vendee could have possession. * * The seller did not waive his right of lien by the delivery order, for no transfer was made." Meaning no transfer with B.

In the Scotch case of *Smith* v. *Pointer*, 22 Cases in Court of Session 208 (A. D. 1860), the facts were that goods had been sold so as to pass the ownership, and they were sent to a bonded warehouse by the seller, and entered in the custom-house books in his name. The name of the purchaser being marked on the casks, the bonded warehouseman entered them in his books in the purchaser's name. The purchaser then gave a delivery order on the warehouseman, who made delivery accordingly. It was held, in an action by the seller against the warehouseman, that the question was the same as between the seller and purchaser, and that there could be no delivery without a delivery order from the seller. The court said: "A complete personal contract of sale is something quite different from the fulfilment of that contract."

It is true that the court reached a different conclusion in *Pearson* v. *Dawson*, 1 E. B. & E. 447, as between the seller and a *sub-purchaser*. In that case the vendor kept a bonded warehouse. The purchaser from him of twenty hogsheads of sugar gave an order in favor of his own sub-purchaser upon him (the seller) as warehouseman. This order the seller accepted by an entry on his books. The sub-purchaser called upon him for a delivery order from time to time, which he furnished. Fourteen hogsheads of sugar remained when the purchaser became insolvent. These

were entered in the vendor's name, and no delivery order had been granted. The court held that as against the sub-vendees there could be no retention of the sugar. As against the original vendees, who had given an acceptance in payment which had been dishonored, it was said that there was a contingent right of detention analogous to stoppage *in transitu*. This might have been preserved as against the sub-vendees by notice. As no notice was given, the equitable right was lost as against an honest purchaser. The remarks of the judges are clear to the point that the entry in the warehouse books as between the vendor and vendee would have had no effect. It was said by Lord CAMPBELL that the entry in the custom-house left a technical possession in the vendor: p. 453. The remark that the lien against the sub-vendees might have been preserved by *notice*, shows that the court must have supposed that it existed as against the vendee, for, of course, no notice to him would be necessary.

These cases appear to us to show that the British authorities are of one accord in maintaining the propositions, that a manual signing of the delivery order is essential even though the ownership has passed; and that when the duties are to be paid by the vendee, there is no delivery until they are actually paid; that when the delivery order is signed, the "request note" (answering to our withdrawal entry) under their practice may be signed either by the vendor or the vendee using the vendor's name, and that as then *nothing* remains to be done by the *vendor*, the delivery is complete; that these principles are wholly unaffected by the question whether there has been a transfer or not in the books of the bonded warehouseman; but that if our practice existed there, requiring the withdrawal entry to be signed by the *vendor*, there would be no delivery until it was signed, and the same rule would be applied where the vendee agreed to pay duties until payment.

The New York cases and other authorities cited by the plaintiffs on the argument, when critically examined, accord with these views.

In *Cartwright* v. *Wilmerding*, 24 N. Y. 529, GOULD, J., in delivering the opinion of the court, says: "To be entitled to enforce that receipt" (the warehouse-keeper's receipt) "they needed to *make a withdrawal entry at the custom-house*, which withdrawal entry could by *law* be made *only* by the *party in whose name* the merchandise was warehoused, or by some person

duly authorized for the purpose by *him;* then pay the duties and procure the 'custom-house permit.'"

"The warehousing permit * * * would regularly be followed by the withdrawal entry; and the *withdrawal entry* (or the EXCLUSIVE authority to make it), *with the warehouse-keeper's receipt*, furnished to the holder the exclusive means and power of obtaining the possession of the property meant to be pledged:" Id. 530.

The *exclusive* "authority to make the withdrawal entry coupled with the warehouse-keeper's receipt * * * come within the ruling (2 Bosw. 444) that they must be 'such documents as will enable the pledgee with *certainty* at the proper time to reduce the goods into his own possession," &c.: Id. 530.

And the court further held that on the facts as found, the withdrawal entry, though made four days after the advance by the pledgee, "should be deemed to have been made at the time of making the advances:" Id. 533.

It is quite evident that the court held that the making of the withdrawal entry, or being *furnished* with *exclusive authority* to make it, together with the warehouse-keeper's receipt, were essential to work a transfer of the *legal* possession, the actual possession not having been changed. The warehouse-keeper's receipt is treated as ineffectual to produce such a result, until the withdrawal entry has been made or exclusive authority to make it has been furnished.

The concurrence of the two facts was held to satisfy the ruling expressed in 2 Bosw. 444, and to furnish "such documentary evidence of title as gives him (the party holding them) the *exclusive control* of the possession," &c.: Id. 530.

It is quite clear, as it appears to us, from the opinion of the court, that if the proper withdrawal entry had not been made, or exclusive authority to make it had not been furnished, the court would have held the advances not to have been made upon such documentary evidence of title as gave the exclusive control of the possession.

The making of a proper withdrawal entry, or furnishing to the plaintiffs exclusive authority to make it, was indispensable in order to enable the plaintiffs to obtain actual possession. The defendants alone could make that entry or furnish such exclusive authority. So long as they forbore to do either, they controlled

the *possession* as between themselves and the plaintiffs as absolutely and exclusively as if the goods were locked up in their own store and the key of the store was in their pocket.

The case of *Waldron* v. *Romaine*, 22 N. Y. 368, involved only the question whether the *property* in the goods, or, in other words, whether the *title* to them, had been vested in the purchaser so that he was liable to pay the contract price where they had been destroyed by fire before they came into his exclusive actual possession. They had been withdrawn from the custom-house in New York, and forwarded in bond in a vessel selected by the purchaser, in order to be transported out of the United States to Canada. The vendor had "complied with the terms of sale" on his part. He had done all that he had agreed to do.

The title to goods purchased may have become vested in the purchaser, so as to make him liable for the price in the event of their destruction by fire or other cause not imputable to any misconduct or neglect of the seller before coming to the actual possession of the purchaser, and yet the seller's lien for the unpaid purchase-money may not have been divested.

This proposition is well illustrated by many of the adjudged cases, where the goods were *in transitu* at the time when the seller reclaimed them and resumed their possession for the unpaid purchase-money.

Where a person residing at one place orders goods from a person residing at another, on a specified credit, and directs them to be forwarded by a designated line of transportation, and the person to whom the order is addressed accepts the proposition contained in it, and complies in all respects with the terms of the order, and notifies the other party that he has done so, there can be no doubt that if the goods are lost or destroyed during the transit, the purchaser is liable for the price. The contract has been consummated and the title to the goods has been transferred to the purchaser, and yet if during the transit the purchaser should become insolvent, the seller might stop the goods and reclaim possession before the transit was ended. He might do this, not for the reason wholly or in part that the title had not become vested in the purchaser, but for the reason that although it had become vested, it was vested subject to the right of the seller, by reason of the insolvency occurring during the transit to reclaim possession as security for the price of the goods.

If in the case of *Harris* v. *Pratt*, 17 N. Y. 249, the goods had been lost between Liverpool and New York, there could be no doubt of the liability of Hall Brothers for the price. The risk of loss from a destruction of the goods sold attends upon the title not upon the possession, where there is no special agreement upon the subject: *Terry* v. *Wheeler*, 25 N. Y. 520, 524. The fact, therefore, that in the event that the goods in question had been consumed by fire in bond prior to the plaintiffs' failure, they would nevertheless have been liable to the defendants for the price, is not decisive of the non-existence of a right, nor necessarily material in determining whether there was a right in the defendants to refuse, after the plaintiffs' insolvency, to make a withdrawal entry without being first paid the balance of the contract price.

The remark of Chancellor WALWORTH in *Mottram* v. *Heyer*, 5 Hill 632, to the effect that "the law recognises his rights" (the right of the owner of goods in bond) "to sell or dispose of them as he pleases, subject only to the custody of the officers of the revenue for the security of the payment of the duties at the time when by law those duties become due and payable," and the observations of CLARKE, J., in *Waldron* v. *Romaine*, 22 N. Y. 370, and of GOULD, J., in *Cartwright* v. *Wilmerding*, 24 N. Y. 536–37, and other like observations in other cases upon the same point, mean simply, as we understand them, that imported goods while in the public store under the warehousing system established by Congress can be bargained and sold, and the title to them vested in different purchasers in succession, subject only to the lien thereon for the payment of duties, as effectually as if the duties had been paid and the goods released from bond before such contracts of sale were made.

But that proposition does not affect the question whether a purchaser of goods thus situated at the time of his purchase has, on a given state of facts, been furnished with such means and power of obtaining the possession of them, as gives to him, as between him and the seller, the exclusive control of the possession.

The duty to make a withdrawal entry and give an order on Snyder & Sons to deliver the goods to the plaintiffs whenever they, in accordance with the terms of the contract, requested these acts to be done, is a duty incurred by the contract of August 20th 1867. Until these acts had been done, that contract had not

been fully performed on the part of the defendants. Until then, the plaintiffs had not acquired, as between them and the defendants, the legal possession or obtained the exclusive control of the possession. They could not obtain this exclusive control as against the defendants themselves, unless nor until the latter should make a withdrawal entry or furnish to the plaintiffs exclusive authority to make it.

It is not material, according to principle or authority, whether the situation of the goods by reason of which the plaintiffs could neither obtain their possession nor control their exclusive possession, arose from the provisions of the Warehousing Act to which the goods were subject when the contract was made, or from causes wholly created by and within the control of the defendants.

The goods were so situated when the contract was made, that the plaintiffs could neither obtain actual possession, nor divest the defendants of the capacity and power to prevent the plaintiffs from obtaining possession until a withdrawal entry, authorizing the plaintiffs to withdraw the goods, had been made by the *defendants*, or until the latter had furnished them with exclusive authority to make such entry.

Although the amount of the duties was in form credited to the plaintiffs as a payment of that amount of the contract price, yet the duties on the goods remaining in bond had not been actually paid. The goods could not be withdrawn until payment was made, and the existence of a withdrawal entry would be useless in that regard, except for the purpose of releasing the goods from custom-house control on the duties being paid. The good sense of the contract is, that the withdrawal entry should be made when the duties were paid, or the plaintiffs were ready and offering to pay on such entry being made.

Although the act of paying the duties by the plaintiffs to the government would in a certain sense be an act done by one of the parties to this contract to a third party (the government), yet as between these parties it would, within the spirit and meaning of the contract, be an act taking place between the *parties* to the *contract*.

Paying the duties would be paying the contract price *pro tanto* according to its clear legal import, and would be an act in diminution and discharge *pro tanto* of the liability of the defendants

and their surety upon the bond given by them on warehousing the goods. This act precedes delivery, which remains inchoate and imperfect until the payment is made by the vendee, whenever he has agreed to make it: *Winks* v. *Hassall*, *supra*.

The question, therefore, is not whether the contract had been consummated so that the title to the goods had vested in the plaintiffs. The whole law of the vendor's lien for the unpaid purchase-money is based on the idea that the title to the goods has been vested in the purchaser. The lien, as it is called, which exists, is a lien on the *purchaser's* property. It is certainly not a lien on the vendor's own property.

Hence it is said in *Arnold* v. *Delano*, 3 Cush. 33, 38, that "there is manifestly a marked distinction between those acts which, as between vendor and vendee, upon a contract of sale, go to make a constructive delivery and to vest the property in the vendee, and that *actual* delivery by the vendor to the vendee which puts an end to the right of the vendor to hold the goods as security for the price." In that case the title had been changed, but the goods were on the vendor's premises; and although the vendee might, at any time prior to his insolvency, have removed them without any aid or facility being furnished by the vendor, yet he had not done so, and the vendor was permitted to retain them as against the general creditors of the vendee, for whose benefit his property had been vested in an assignee.

This right to retain or stop *in transitu*, on the vendee becoming insolvent, is a right resulting from the contract of sale, and is as truly a part of it as if it were in terms stipulated in the contract itself.

Hence it is said in *Myles* v. *Gorton*, 2 Crompt. & Mees. 504, 511, that "the general rule of law is, that where there is a sale of goods, and nothing is specified as to delivery or payment, although everything may have been done to divest the property out of the vendor, and so as to throw upon the vendee *all risk* attendant upon the goods, still there *results* to the vendor *out of the original contract* a right to retain the goods until payment of the price:" *vide White* v. *Welsh*, 2 Wright, Penna. St. R., 396.

The vendor's lien is not divested merely because the goods may have gone out of his actual possession. This is true of all goods stopped *in transitu* while being carried by a common carrier, or

in the hands of some middleman. The general rule is, that the consignor may stop the goods before they come into the possession of the consignee: *Bohtlingk* v. *Inglis*, 3 East 381. This possession, it was said in *Ellis* v. *Hunt*, 3 Durnford and East 466, means actual possession: to constitute an actual possession by the vendee the goods must be either literally in his actual possession, or in the actual possession of his agent or servant for him, under such circumstances that the vendee has the exclusive means and power of controlling the actual possession.

The case of *Cowasjee* v. *Thompson*, 5 Moore P. C. 170, which was so confidently relied upon in the plaintiffs' argument, turned upon such special circumstances that it is of little value as a precedent. In that case goods were contracted to be sold and delivered "free on board." When this language is used, the buyer is, by the English practice, deemed to be the shipper instead of the seller. The effect of this language may be obviated by adding the words "*for and on account of the seller*," or their equivalent: *Crann* v. *Ryder*, 6 Taunt. 433. The goods were to be paid for by cash or bills of exchange, at the option of the seller. In case he took cash, he was to submit to $2\frac{1}{2}$ per cent. discount. The seller elected to take the bills instead of cash. When the lighterman of the seller placed the goods on board ship, he took receipts from the mate and handed them over to the seller. The court held that the delivery "free on board," and the election to take payment by a bill, made a complete delivery. The seller had no right to the receipts, as he had been *paid*, and he might be compelled in equity to surrender them. The court say, "payment in cash would have been made if the sellers had preferred to lose $2\frac{1}{2}$ per cent. discount, *therefore* they never can be heard to set up the receipts against the purchaser. They are bound to give them up in good conscience, and would have been compelled in equity," &c., p. 174. This case has plainly no analogy to the one now under discussion. In *Berndston* v. *Strang*, 26 Law Journal N. S. Ch. 879, Sir W. PAGE WOOD, V.-C., says of this case, "there a ship was sent out, goods were ordered for that ship, and the ship *being the property of the person sending her out*, the *transitus* was complete when the goods were delivered on board, pursuant to order, nothing else being directed or intended by anybody." This is, no doubt, a correct version of

the case, except the matter of the receipts, and that was disposed of by the fact of *payment*.

The result is, that the goods in question, when the contract was made, were in bond *deliverable only to the order of the defendants*, and remained in that place and position up to the time of the plaintiffs' insolvency. The plaintiffs could not obtain possession of them without the defendants doing an act which by the legal import and effect of the contract of sale they undertook to do, in part execution of the contract, when the occasion called for it. That act has not been done by the defendants. They have not signed a withdrawal entry authorizing the plaintiffs to withdraw the goods and take possession of them, nor have they furnished to the plaintiffs any authority to make such entry. In our view of the law, upon the facts proved, the defendants have a right to retain the goods as a security for the unpaid purchase-money.

There is another difficulty in the way of the plaintiffs. This is an action in equity, and must be maintained either on the theory of an action for specific performance or for the enforcement of a trust. On the first theory, it would be necessary to tender the price, in accordance with the ordinary practice in such cases, as the vendee is just as truly a trustee of the purchase-money as the vendor of the subject of sale. If the claim is, that there is a trust, the answer is, that this cannot arise in the case of ordinary chattels until the goods are paid for, or the vendor is estopped as against third persons to say that they are not paid for: *Pooley* v. *Budd*, 14 Beavan 34, 45, 46, 47. This case explains the remark of Lord BROUGHAM in *Cowasjee* v. *Thompson*, *supra*, on his theory that the goods had been *paid for*, that the receipts were held by the vendor in such a manner that he could be required, in equity, to surrender them. The vendees in the present case being insolvent, and having made no payment, could consequently have no relief in this court.

Such judgments must, therefore, be given as will protect the right of the defendants to retain the goods for the unpaid price.